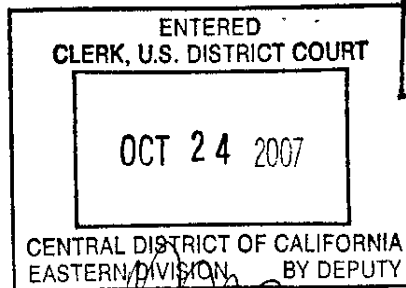
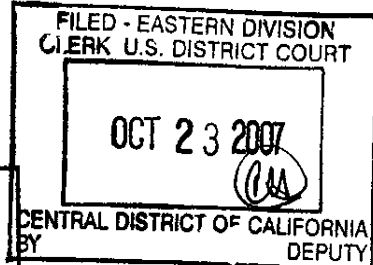


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARY JO KITTOK, JOHN
LONBERG,

Plaintiff,

v.

LOWE'S HIW, INC., a
Washington Corporation,
and DOES 1 through 100,
inclusive,

Defendants.)

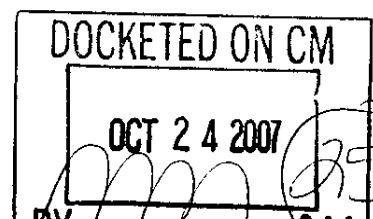
Case No. EDCV 06-1238-VAP
(OPx)

[Motion filed on August 17,
2007]

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiffs Kittok and Lonberg filed a Complaint ("Compl.") on September 18, 2006 for violations of (1) the Americans with Disabilities Act ("ADA"), (2) the Unruh Civil Rights Act, (3) the California Disabled Persons Act and (4) negligence against Defendant Lowe's HIW, Inc. ("Lowe's") and Does 1 through 100, inclusive in the California Superior Court for the County of Riverside. On November 13, 2006, Defendant Lowe's removed the action to this Court.



1 Defendant filed a Motion for Summary Judgment and a
2 Memorandum of Points and Authorities ("Mem. P. & A.") and
3 lodged a Statement of Uncontroverted Facts and
4 Conclusions of Law on August 17, 2007. Plaintiffs filed
5 an Opposition ("Opp'n") and a Statement of Genuine Issues
6 ("St. of Issues") on August 28, 2007.

7 8 II. LEGAL STANDARD

9 A motion for summary judgment shall be granted when
10 there is no genuine issue as to any material fact and the
11 moving party is entitled to judgment as a matter of law.
12 Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc.,
13 477 U.S. 242, 247-48 (1986). The moving party must show
14 that "under the governing law, there can be but one
15 reasonable conclusion as to the verdict." Anderson, 477
16 U.S. at 250.

17
18 Generally, the burden is on the moving party to
19 demonstrate that it is entitled to summary judgment.
20 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998);
21 Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707
22 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears
23 the initial burden of identifying the elements of the
24 claim or defense and evidence that it believes
25 demonstrates the absence of an issue of material fact.
26 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

1 Where the non-moving party has the burden at trial,
2 however, the moving party need not produce evidence
3 negating or disproving every essential element of the
4 non-moving party's case. Celotex, 477 U.S. at 325.
5 Instead, the moving party's burden is met by pointing out
6 that there is an absence of evidence supporting the non-
7 moving party's case. Id.

8
9 The burden then shifts to the non-moving party to
10 show that there is a genuine issue of material fact that
11 must be resolved at trial. Fed. R. Civ. P. 56(e);
12 Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 256. The
13 non-moving party must make an affirmative showing on all
14 matters placed in issue by the motion as to which it has
15 the burden of proof at trial. Celotex, 477 U.S. at 322;
16 Anderson, 477 U.S. at 252. See also William W.
17 Schwarzer, A. Wallace Tashima & James M. Wagstaffe,
18 Federal Civil Procedure Before Trial § 14:144.

19
20 A genuine issue of material fact will exist "if the
21 evidence is such that a reasonable jury could return a
22 verdict for the non-moving party." Anderson, 477 U.S. at
23 248. In ruling on a motion for summary judgment, the
24 Court construes the evidence in the light most favorable
25 to the non-moving party. Barlow v. Ground, 943 F.2d
26 1132, 1135 (9th Cir. 1991); T.W. Electrical Serv. Inc. v.

1 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31
2 (9th Cir. 1987).

3
4 **III. UNCONTROVERTED FACTS**

5 The following material facts have been supported
6 adequately by admissible evidence and are uncontroverted.
7 They are "admitted to exist without controversy" for the
8 purposes of this Motion. See L.R. 56-3.

9
10 Plaintiff John Lonberg is disabled and uses a
11 wheelchair for mobility. [Statement of Uncontroverted
12 Facts ("SUF") at ¶ 1.]

13
14 Plaintiff Mary Jo Kittok is disabled and uses a
15 wheelchair for mobility. [SUF at ¶ 2.]

16
17 Defendant Lowe's HIW, Inc. owns and operates a store
18 located at 9851 Magnolia Avenue, Riverside, California
19 92502. The store is located in a shopping center that
20 includes multiple other stores and restaurants owned and
21 operated by persons and entities other than Defendant.
22 [Declaration of Ken Bryan ("Bryan Decl.") at ¶ 3.] [SUF
23 at ¶ 3.]

24
25 On September 18, 2006, Plaintiffs filed the present
26 lawsuit. Plaintiffs allege only one specific
27
28

1 accessibility complaint, in paragraph 8 of their
2 Complaint, which states, in its entirety, as follows:

3 During their visits [to Defendant's property],
4 Plaintiffs encountered various violations of the
5 Americans with Disabilities Act Accessibility
6 Guidelines ("ADAAG") and Title 24 of the
7 California Code of Regulations, including but
8 not limited to, there is a lack of an accessible
9 path of travel into Lowe's home furnishing store
10 as there is no curb cut allowing them to travel
11 from the parking area into the store. [Sic.]

12 [Compl. at ¶ 8.] [SUF at ¶ 4.]

13

14 Defendant's parking area, which contains
15 wheelchair-accessible parking located directly in
16 front of the entrance to the store, is on ground
17 which is level to the front entrance. There are no
18 curbs (and hence no need for curb cuts) between the
19 parking area and the front entrance of the store.

20 [Bryan Decl. at ¶ 4.] [SUF at ¶ 5.]

21

22 Plaintiffs testified that they first visited
23 Defendant's store in 2001. [Lonberg Depo. at 48:18-
24 49:10; Kittok Depo. at 47:20-22; 50:6-10.] [SUF at ¶
25 7.]

26

27

28

1 Plaintiffs filed this lawsuit on September 18,
2 2006. [SUF at ¶ 8.]

3

4 Plaintiff Kittok testified at her deposition
5 that the present lawsuit was filed after the
6 following sequence of events:

- 7 • She and Plaintiff Lonberg were talking;
- 8 • She received a telephone call from Plaintiffs'
9 Counsel, calling her about an unrelated matter;
- 10 • She told Plaintiffs' Counsel "I got a Lowe's
11 case for you;"
- 12 • Plaintiff Lonberg told her "Tell [Plaintiffs'
13 Counsel] I wanted to be with you;"
- 14 • She then made a single toll free telephone call
15 to Plaintiffs' Counsel's office, during which
16 she spent between 15 and 30 minutes providing
17 information to "just the receptionist. . . or
18 Lauren or Jessica, the other women in the
19 office" (she was not sure to whom she spoke).
20 According to Plaintiff Kittok, "And that was how
21 it happened."

22 [Kittok Depo. At 45:9-46:10.] [SUF at ¶ 9.]

23

24 Plaintiffs' Counsel thereafter filed Plaintiffs'
25 Complaint. Plaintiff Lonberg admitted at his
26 deposition that he was not provided with a copy of
27 Plaintiffs' Complaint and did not review Plaintiffs'

28

1 Complaint before Plaintiffs' Counsel filed it with
2 the Court. [Deposition of John Lonberg ("Lonberg
3 Depo.") at 47:9-48:1.] Similarly, Plaintiff Kittok
4 testified that she did not know if she had ever seen
5 a copy of Plaintiffs' Complaint before her
6 deposition, and in any event, had no specific
7 recollection that she had seen it before. [Kittok
8 Depo. at 45:9-46:10.] [SUF at ¶ 10.]

9
10 At deposition, rather than discussing the claim
11 actually pled in their Complaint, which both
12 Plaintiffs expressly renounced, Plaintiffs discussed
13 other accessibility problems that they believe exist
14 at the shopping center where Defendant's store is
15 located. For example, Plaintiffs testified regarding
16 alleged accessibility barriers at Quiznos Subs, Cold
17 Stone Creamery, Verizon Wireless, REA Riverside and
18 the public sidewalks owned and operated by the City
19 of Riverside. [SUF at ¶ 13.]

20
21 Defendant does not own any of those retail
22 stores nor does it have any ownership interest in or
23 control over the REA Riverside or City of Riverside
24 sidewalks, or the parking lot areas immediately
25 adjacent to them, or any of them. [SUF at ¶ 14.]

1 Plaintiffs have continued to prosecute the
2 lawsuit and have not dismissed it, despite a "meet
3 and confer" request to do so by Defendant's Counsel.
4 [SUF at ¶ 15.]

5
6 Defendant has incurred more than \$25,000.00 in
7 attorney's fees and costs in defending this lawsuit.
8 [SUF at ¶ 16.]

9
10 **IV. DISCUSSION**

11 The material facts are not disputed. Both Plaintiffs
12 and Defendant agree that the First Amended Complaint sets
13 forth that Plaintiffs encountered "various violations" of
14 the ADAAG, "including but not limited to," "a lack of an
15 accessible path of travel into Lowe's home furnishing
16 store as there is no curb cut allowing them to travel
17 from the parking area into the store." [Compl. at ¶ 8.]
18 Both parties also agree that Defendant's parking area is
19 on the same level as Defendant's front entrance and there
20 is no curb between Defendant's parking area and
21 Defendant's front entrance. [Lonberg Depo. at 69:15-
22 70:10; Kittok Depo. at 57:8-57:16; Mem. P. & A. at 3.]

23
24 Thus, the only issue in this motion is whether
25 Plaintiffs can proceed forward on the various other
26 violations claimed by them during discovery. Defendant
27 contends that the only claim pleaded in the Complaint is
28

1 the lack of a curb cut between Defendant's parking lot
2 and Defendant's front entrance, and therefore it is
3 entitled to summary judgment in its favor. [Mem. P. & A.
4 at 3.]

5
6 Alternatively, Defendant argues that Plaintiffs'
7 claims should be dismissed as a matter of law because (1)
8 they are barred by the statute of limitations and
9 (2) there is no present, live controversy. [Mem. P. & A.
10 at 6, 8.]

11
12 **A. The "Curb Cut" Claim**

13 Defendant argues that the inclusion of claims not
14 specified in the Complaint fails to give it fair notice
15 of Plaintiff's claims under Ninth Circuit precedent.
16 [Mem. P. & A. at 4- 6 (citing Pickern v. Pier 1 Imports
17 (U.S.), Inc. ("Pickern I"), 339 F.Supp. 2d 1081, 1088
18 (E.D. Cal. 2004); *aff'd*, Pickern v. Pier 1 Imports
19 (U.S.), Inc. ("Pickern II"), 457 F.3d 963 (9th Cir.
20 2006); Wilson v. Norbreck, LLC, No. Civ. S-040690 DFL
21 JFM, 2005 WL 3439714 (E.D. Cal. 2005); Sanford v.
22 Roseville Cycle. Inc., No. Civ. 04-1114 DFL CMK, 2007 WL
23 512426 (E.D. Cal. 2007); Sanford v. Robinson, Inc., No.
24 2:05-CV-1941-GEB, 2006 WL 1867616 (E.D. Cal 2006).]

25
26 Defendant's argument and citations of Ninth Circuit
27 cases in its support are persuasive. In Pickern I, the
28

1 plaintiff introduced new allegations of discrimination
2 for the first time in her opposition to defendant's
3 summary judgment motion. The district court held:

4
5 To permit plaintiff to construe her complaint
6 as entirely generic and, throughout the
7 litigation, incorporate any new factual
8 allegations without seeking amendment would
9 read the "fair notice" requirement out of
10 Rule 8(a) and would seriously undermine the
11 rule's goal of encouraging expeditious
12 resolution of disputes.

13 Id. at 1088.

14
15 In Pickern II, the appellate court affirmed the lower
16 court's ruling stating that:

17
18 [p]roviding a list of hypothetical possible
19 barriers is not a substitute for
20 investigating and alleging the grounds for a
21 claim. . . [t]hus, the complaint gave the
22 [defendant] no notice of the specific factual
23 allegations presented for the first time in
24 [plaintiff's] opposition to summary judgment.

25
26 In the present case, the new claims were alleged
27 during Plaintiffs' depositions, rather than after close
28

1 of discovery as in Pickern I. Nevertheless, Defendant
2 did not receive sufficient notice of Plaintiffs' specific
3 factual allegations. Even during Plaintiffs'
4 depositions, it was far from clear upon what grounds
5 Plaintiffs' new claims are based.

6
7 In Wilson, the plaintiff alleged more than sixty
8 different ADA violations in three different documents.
9 The district court noted, "[t]o make matters more
10 confusing, [defendant] lists some of the alleged
11 violations in all three documents, others in two of the
12 three documents, and still others in only one document."
13 Wilson, 2005 WL 3439714 at 1. The district court refused
14 to allow plaintiff to move for summary judgment on claims
15 that were not included in the complaint or in any timely
16 amendment to the complaint. Id. at 2.

17
18 In Sanford v. Roseville, the defendant failed to
19 respond to any motions, requests for discovery, and court
20 orders. Plaintiff moved for summary judgment and the
21 district court did not allow Plaintiff to rely on an
22 expert report to allege barriers not identified in the
23 complaint. Id. at 1. In Sanford v. Robinson, the
24 district court did not allow modifications for violations
25 proposed in a judgment agreed upon by the parties but not
26 in the complaint.

1 In the present case, the Complaint alleges "various
2 violations" of the ADAAG; however, it does not specify
3 the grounds for these alleged violations. Defendant has
4 not received sufficient notice of Plaintiffs' specific
5 factual allegations. Thus, Plaintiffs have failed to
6 allege that Defendant is noncompliant with the ADAAG. In
7 all of the above cases the district court consistently
8 denies inclusion of disability discrimination claims that
9 were not alleged in the complaint but were later
10 specified.

11

12 **B. Other Violations Alleged by Plaintiffs**

13 The Court declines to consider new purported
14 violations not alleged in the Complaint. It notes that
15 even if such newly-asserted violations are examined,
16 however, Plaintiffs make absolutely no showing that
17 Defendant owns or controls the properties where such
18 alleged violations occurred.

19

20 Defendant demonstrates here that it does not own or
21 control any of the properties where Plaintiffs allege the
22 ADAAG violations occurred. [SUF at ¶ 14.] Since
23 Plaintiffs failed to dispute such material facts
24 regarding Defendant's ownership or control presented in
25 Defendant's Statement of Uncontroverted Facts, the Court
26 accepts them as true. Thus, Plaintiffs have failed to
27 demonstrate that Defendant is noncompliant with the
28

1 ADAAG, that Plaintiffs have encountered barriers to
2 access on Defendant's property, and that such barriers
3 deterred Plaintiffs from visiting Defendant's property.

4
5 The Court does not reach Defendant's arguments
6 regarding the statute of limitations and lack of present,
7 live controversy as they are moot.

8
9 **C. Sanctions and Attorney's Fees**

10 Defendant argues that "[a] reasonable pre-lawsuit
11 investigation of facts and law would have demonstrated
12 that Plaintiffs' claims never should have been filed,"
13 and it "should not have been prosecuted further once
14 Plaintiffs' deposition was taken[.]" [Mem. P. & A. at
15 13.] Defendant requests "an award of monetary sanctions
16 against Plaintiffs and Plaintiff's Counsel[.]" [Id.]

17
18 Although it is not clearly stated in Defendant's
19 Motion, the main basis for Defendant's request for
20 sanctions and attorney's fees is the fee-shifting
21 provision of the ADA (42 U.S.C. § 12205). [Mem. P. & A.
22 at 10-12.] A court may award a prevailing party
23 reasonable attorney's fees under the ADA; the ADA does
24 not specify under what circumstances such an award is
25 appropriate, however. [42 U.S.C. § 12205.] The Ninth
26 Circuit has adopted the standard set forth in
27 Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978),
28

1 which governs fee shifting under Section 706(k) of Title
2 VII, to apply to the ADA fee-shifting provision.¹ See
3 Summers v. A. Teichert & Son, Inc., 127 F.3d 1150 (9th
4 Cir. 1997).

5
6 Under the Christiansburg standard a prevailing
7 defendant may not receive fees "unless a court finds that
8 [the plaintiff's] claim was frivolous, unreasonable, or
9 groundless, or that the plaintiff continued to litigate
10 after it clearly became so." Christiansburg, 434 U.S. at
11 422. The Christiansburg court did not require that an
12 action be brought in "subjective bad faith," but held
13 that "if a plaintiff is found to have brought or
14 continued such a claim in *bad faith*, there will be an
15 even stronger basis for charging him with the attorney's
16 fees incurred by the defense." Id.

17
18 Here, Plaintiffs specified an ADAAG violation in
19 their Complaint that they admit is baseless. [Lonberg
20 Depo. at 69:15-70:10; Kittok Depo. at 57:8-57:16
21 (testifying that Defendant's parking area is on the same
22 level as Defendant's front entrance and there is no curb
23 between Defendant's parking area and Defendant's front
24

25
26 ¹ Other Circuits also have applied the Christiansburg standard
27 to the ADA fee-shifting provision. See Small v. Dellis, 211 F.3d
28 1265 (4th Cir. 2000); Bruce v. City of Gainesville, 177 F.3d 949,
951-52 (11th Cir. 1999); Bercovitch v. Baldwin School, Inc., 191
F.3d 8, 11 (1st Cir. 1999); see also Adkins v. Briggs & Stratton
Corp., 159 F.3d 306, 307-08 (7th Cir. 1998).

1 entrance).] Plaintiffs testified that they had made
2 multiple visits to Defendant's store beginning in 2001
3 and the present action was filed on September 18, 2006.
4 [Lonberg Depo. at 48:18-49:10; Kittok Depo. at 47:20-22;
5 50:6-10; SUF at ¶ 8.]

6
7 It is clear that the lack of a curb between
8 Defendant's parking area and Defendant's front entrance
9 can be determined from even just one visit. [SUF at ¶
10 5.] It is also clear that Plaintiffs' Counsel failed to
11 investigate or even discuss the alleged ADAAG violation
12 with Plaintiffs as neither Plaintiff had reviewed the
13 Complaint before it was filed. [SUF at ¶ 10.] Further,
14 as previously stated above, Plaintiffs make no
15 evidentiary showing with respect to the other ADAAG
16 violations alleged against Defendant. Once again,
17 Plaintiffs' Counsel failed to investigate whether the
18 alleged ADAAG violations occurred on Defendant's
19 property.

20
21 Plaintiffs' ADAAG violations claims were objectively
22 meritless in light of the prosecution history and
23 relevant legal principles. Under the Christiansburg
24 standard, subjective intent is not required for an award
25 of attorney's fees. The Court finds that this is an
26 appropriate case for an award of attorney's fees to the
27 prevailing party.

28

1 In light of the responsibility vested in counsel as a
2 member of the state bar and as a duly-admitted member of
3 the bar admitted to practice before this Court, the Court
4 finds that the fees should be borne not by his clients in
5 this case, but by counsel Mark Potter's firm, Center for
6 Disability Access, LLP. Mr. Lonberg and Ms. Kittok had
7 no opportunity to review the Complaint before it was
8 filed with this Court. Hence, they had no chance to
9 correct the inaccurate pleading in it regarding a curb
10 barrier which did not exist. Mr. Potter not only had the
11 opportunity and duty to investigate, under Rule 11 of the
12 Federal Rules of Civil Procedure, for example, the
13 accuracy of the allegations in the Complaint before it
14 was filed, he also had the duty, when the inaccuracy of
15 the allegation was brought to his attention during his
16 clients' depositions, to investigate further and desist
17 from further litigation. He abrogated his duty in both
18 instances. Center for Disability Access, LLP, and not
19 its clients, shall pay sanctions in the amount of
20 \$25,000.00² to Defendant.

21 ///

22 ///

23 ///

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25 ² In arriving at this figure, the Court has
26 considered the amount of reasonable attorney's fees
27 actually incurred by Defendant in defending this action,
28 as reflected in the billings submitted by defense
counsel. See Jordan v. Multnomah County, 815 F.2d 1258,
1262 (9th Cir. 1987).

1 **D. Remand**

2 Under 28 U.S.C. Section 1367, this Court may decline
3 supplemental jurisdiction over state law claims if "the
4 district court has dismissed all claims over which it has
5 original jurisdiction." 28 U.S.C. § 1367(c)(3). In this
6 Order, the Court grants summary judgment on the claim
7 that provided the basis for federal question jurisdiction
8 and therefore exercises its discretion and declines to
9 exercise jurisdiction over the remaining state law
10 claims.

11
12 A case shall be remanded when the court lacks subject
13 matter jurisdiction. See 28 U.S.C. § 1447(c). The Court
14 remands the remaining state claims to the Superior Court
15 of California for the County of Riverside.

16
17 **V. CONCLUSION**

18 For the foregoing reasons, the Court GRANTS
19 Defendant's Motion for Summary Judgment with respect to
20 the ADA claim, and GRANTS Defendant's request for
21 sanctions in the amount of \$25,000.00, against
22 Plaintiffs' counsel Mark Potter's firm, Center for
23 Disability Access, LLP only. The Court remands the
24 remaining state claims to the Superior Court of
25 California for the County of Riverside.

26 ///

27 ///

28

1 The Clerk of Court is directed to forward a copy of
2 this order to the California State Bar, Office of
3 Disciplinary Proceedings.

4
5 IT IS SO ORDERED.

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9 Dated: Oct. 22, 2007

Virginia A. Phillips
10 VIRGINIA A. PHILLIPS
11 United States District Judge
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